Supreme Court, U.S.
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No. 02-0260

In The
Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C.
and ARIZONA CHEMICAL CO.,

Petitioners,

v.

Cynthia UNDERWOOD, Commissioner of the Department of Revenue of the State of Alabama,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court correctly ruled that the State of Alabama enjoys sovereign immunity under § 14 of the Alabama Constitution from petitioners' direct class action seeking tax refunds, when the Alabama Legislature has prescribed a separate administrative process that a taxpayer must follow to obtain a tax refund.

2. Whether, when it followed Alabama statutes and its own unbroken line of precedent holding that a taxpayer may not sue the State directly for a tax refund, the Alabama Supreme Court denied petitioners due process through a "bait and switch," because an intermediate appellate court had twice contradicted these superior authorities and permitted taxpayers to bring direct actions for tax refunds.

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STATEMENT OF THE CASE

This case began in May 1996, when Gladwin Corporation filed a class action against the Commissioner of the Alabama Department of Revenue. Gladwin sought franchise tax refunds on behalf of all foreign corporations that had overpaid franchise taxes to the State of Alabama. Gladwin did not first seek, however, to obtain these refunds through the administrative process prescribed by the Taxpayers' Bill of Rights and Uniform Procedures Act ("the TBOR"), Ala. Code §§ 40-2A-1 to -15, 40-2A-7(c)(5)c. & -9(g)(1), which had been enacted in 1992.

The Alabama Supreme Court ruled in this case that Gladwin's failure to comply with the TBOR meant that the trial court lacked subject matter jurisdiction over Gladwin's suit. Absent strict compliance with the administrative process mandated by statute for obtaining tax refunds, the Alabama Supreme Court ruled that the State was immune from suit under § 14 of the Alabama Constitution. The court also ruled that the requirements of the tax refund statutes were jurisdictional, barring Gladwin's suit in any event.

1. The current Commissioner of the Alabama Department of Revenue is respondent Cynthia Underwood. Petitioner Millcraft-SMS Services, L.L.C. is the successor in interest to Gladwin Corporation. This brief will refer to Millcraft as "Gladwin" – the company name used by the courts below. The other petitioner is Arizona Chemical Company.

As noted, Gladwin commenced this action in 1996. While the underlying litigation in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), was pending, Gladwin moved for an injunction, requesting that

franchise taxes collected by the Commissioner be held in escrow pending the outcome of *South Central Bell*. In August 1997, the trial court granted Gladwin's request. Pet. App. 69a, 77a. In October 1998, the Alabama Supreme Court reversed the injunction, but did not, as Gladwin now implies, rule that Gladwin's direct class action against the State was permissible. *Compare* Pet. 3, 11-12 *with* Pet. App. 72a.

Rather, the Alabama Supreme Court ruled that Gladwin had failed to show "imminent risk of irreparable injury," because Gladwin had "strenuously argue[d] that it [was] entitled to the full range of retroactive relief, including refunds." Pet. App. 72a. The court did not address whether Gladwin was entitled to bring a direct class action, and it did not imply that Gladwin's action was proper regardless of its procedural defects. In fact, the court was not aware that Gladwin had failed to comply with the TBOR before bringing its suit. Pet. App. 34a n.3. One justice of the Alabama Supreme Court even concurred specially and noted that tax refunds would be available to "those taxpayers that timely filed claims for refunds." Pet. App. 74a.

2. In March 1999, this Court decided *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), ruling that Alabama's franchise tax scheme violated the Commerce Clause of the United States Constitution. Thereafter the Department of Revenue ceased collection of the former franchise tax, and the Alabama Legislature passed replacement legislation, the Alabama Business Privilege Tax Act of 1999. Ala. Code §§ 40-14A-1 to -43. The business privilege tax is now calculated from the net worth of a corporation without regard to its state of incorporation. *Id.* § 40-14A-22.

On remand from *South Central Bell*, the Alabama Supreme Court held, and the Commissioner agreed, that this Court's decision in *South Central Bell* would be applied retroactively. *South Central Bell Tel. Co. v. State*, 789 So. 2d 147, 148-49 (Ala. 2000). In addition, the Alabama Supreme Court observed that "failure to comply with state procedural requirements can preclude a recovery of taxes paid pursuant to a levy or assessment that violates the United States Constitution." *Id.* at 149 n.7 (citing *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45 (1990); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 757-58 (1995)). The court remanded the case to the trial court with directions to collect evidence from the parties of, among other things, compliance with the relevant tax refund statutes, to determine what remedy, if any, the taxpayers were entitled to receive. *Id.* (citing former Ala. Code § 40-2-22 for the years 1982-92, and § 40-2A-7 for the years 1992-99). Ultimately, the plaintiffs in *South Central Bell* settled their claims with the Commissioner prior to any ruling by the Alabama Supreme Court on a remedy. Pet. App. 2a.

3. In October 2000, two additional taxpayers joined Gladwin as plaintiffs in the class action. Pet. App. 37a. Both of those taxpayers, petitioner Arizona Chemical Company and Jefferson Smurfit Corporation (U.S.), had filed claims under the TBOR and were pursuing those claims to perfect subject matter jurisdiction at the time they joined Gladwin's class action. Pet. App. 37a, 41a. Gladwin's current counsel were also counsel for Arizona Chemical and Jefferson Smurfit at the time. They advised their clients that it would be "prudent to file administrative claims for refunds." Pet. App. 51a.

In January 2001, petitioners Gladwin and Arizona Chemical filed a Memorandum in Support of Class Certification, seeking a class whose definition included all foreign franchise taxpayers, regardless of whether they had filed administrative claims. Pet. App. 38a. In response, the Commissioner moved to dismiss the case, contending that the court lacked subject matter jurisdiction under the TBOR and that petitioners' claims violated the State's sovereign immunity under § 14 of the Alabama Constitution of 1901. Pet. App. 39a-40a. The trial court acknowledged that petitioners had not invoked jurisdiction under the TBOR – Gladwin because it had not filed administrative claims at all, and Arizona Chemical because it had not completed the administrative process. Pet. App. 41a. The trial court nevertheless exercised jurisdiction over petitioners' claims and denied the Commissioner's motion to dismiss as to Gladwin and Arizona Chemical.[1] Pet. App. 42a.

The trial court cited only two cases in denying the Commissioner's motion to dismiss: *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979), and *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App.), *cert. denied*

[1] In 1998, Jefferson Smurfit appealed to the Circuit Court of Montgomery County, Alabama the denial of its petition for refund under TBOR. That appeal was pending in 2000, when Jefferson Smurfit joined Gladwin's class action. Pet. App. 39a. The Commissioner moved to dismiss Jefferson Smurfit's claims on grounds of lack of subject matter jurisdiction and sovereign immunity. The Commissioner also moved to dismiss under Ala. Code § 6-5-440, which provides that a plaintiff is not entitled to prosecute two simultaneous actions in Alabama courts for the same claims against the same party. The trial court dismissed Jefferson Smurfit's claims under § 6-5-440. Jefferson Smurfit did not appeal the dismissal. Pet. App. 40a.

(Ala. 1999), *and cert. denied,* 120 S. Ct. 1426 (2000). In *Valhalla*, the intermediary court of appeals did not address sovereign immunity but rather based its decision on an ad valorem tax decision by the Alabama Supreme Court. 749 So. 2d at 473. That ad valorem tax decision was irrelevant to the TBOR, because the TBOR excludes ad valorem taxes from its scope. Ala. Code § 40-2A-2(2). In *Thorn*, a class of taxpayers had sought ad valorem tax refunds. *Thorn* also did not involve the TBOR, as petitioners have conceded, Pet. 3, for the obvious reason that the TBOR was enacted in 1992 and *Thorn* was decided in 1979. Even if *Thorn* were decided today, it would not contradict the TBOR, because, again, the TBOR excludes ad valorem taxes from its scope.

In June 2001, the trial court certified a class of taxpayers. The court ruled that taxpayers who had pursued refunds under the TBOR could be represented by petitioner Arizona Chemical. Those taxpayers who had not pursued remedies under the TBOR could be represented by petitioner Gladwin. Pet. App. 44a.

4. In August 2001, the Commissioner filed an interlocutory appeal to the Alabama Supreme Court under Ala. Code § 6-5-642, challenging the trial court's class certification ruling. Pet. App. 3a. The Commissioner's primary contention was that the trial court lacked subject matter jurisdiction over the action. Pet. App. 6a. Prior to oral argument, the Alabama Supreme Court instructed petitioners to address sovereign immunity and the effect of their failure to comply with the TBOR. Pet. 4.

On May 17, 2002, the Alabama Supreme Court ruled that the trial court lacked subject matter jurisdiction over

petitioners' claim. The court ruled that, because petitioners had failed to comply with the TBOR, a direct action for tax refunds against the State violated sovereign immunity. Pet. App. 34a. In addition, because the TBOR is jurisdictional on its face, the court held that non-compliance with the administrative procedures prescribed by the TBOR barred petitioners' claims. Pet. App. 33a.

The court rejected the "bait and switch" argument that petitioners seek to advance to this Court. The court recounted the long history of Alabama cases barring refunds to taxpayers based upon their failure to comply with the administrative processes prescribed in various tax refund statutes. "[N]othing in the refund statutes discussed," the court stated, "or in this Court's caselaw construing those statutes, suggests to the reasonable taxpayer that anything less than strict statutory compliance is sufficient to support a right to a tax refund from the State." Pet. App. 28a. The Alabama Supreme Court found that the holdings and the rationales of all of its decisions from 1939 to the present supported this position. Pet. App. 22a. The court concluded that "[t]he reasonable taxpayer contemplating a forum for franchise-tax refunds had no reason to believe that a direct action against the State was permitted under Alabama law. The TBOR is jurisdictional on its face." Pet. App. 33a (*citing* Ala. Code §§ 40-2A-7(c)(5)c. & -9(g)(1)).

The Alabama Supreme Court distinguished several cases cited by petitioners on the ground that the cases involved ad valorem taxes assessed by counties, which have never enjoyed sovereign immunity under Alabama law. Pet. App. 29a. The court discussed at length the tax refund statutes that had been in effect over the past 67 years, none of which applied to ad valorem taxes. Pet. App.

14a, 15a, 25a-27a. The court also distinguished two decisions of the Alabama Court of Civil Appeals – *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993); and *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999) – upon which petitioners now base their "bait and switch" argument. The court dismissed these lower court decisions as aberrant departures from the Alabama Supreme Court's unswerving line of cases requiring strict compliance with tax refund statutes in order to sue the State of Alabama or its officers in state court. Pet. App. 30a-32a. In any event, the Alabama Supreme Court noted that *Monroe* was decided in 1999, and thus could not have led the "reasonable taxpayer" to conclude it could bring a direct suit for tax refunds in 1996, when Gladwin filed its class action. Pet. App. 32a.

Finally, the court rejected petitioners' argument that their direct class action for refunds should be treated as an exception to the State's sovereign immunity doctrine, because the trial court could order the Commissioner in equity to fulfill her "ministerial duty" to issue the requested refunds. Pet. App. 28a. The court ruled that compliance with the TBOR, along with a decision by the Department of Revenue or by a court reviewing a decision of the Department, was necessary to make the Commissioner's duty to issue the refunds "ministerial." Absent compliance with the TBOR, the ministerial act exception to sovereign immunity was not available to petitioners as a matter of Alabama law. Pet. App. 28a-29a.

REASONS FOR DENYING THE PETITION

The decision below rests on independent and adequate state law grounds. Petitioners' facile attempt to divine a federal issue from this case should be rejected, along with their petition for a writ of certiorari. Alabama has provided petitioners an administrative remedy for their franchise tax refund claim. The Supreme Court of Alabama has not wavered in holding that strict compliance with the administrative process prescribed by a tax refund statute is necessary for a taxpayer to obtain a refund from the State. It is the fault of petitioners, not of the State, that they failed to comply with the administrative process prescribed by Alabama's tax refund statute.

Petitioners' contention that the State tricked them into bringing this class action, instead of seeking the proper administrative remedy, is fatuous nonsense. Two aberrant and distinguishable decisions by an intermediate court of appeals would not have induced the reasonable taxpayer to ignore the clear language of Alabama's tax refund statute or the unbroken line of the authority in the Alabama Supreme Court requiring strict compliance with that statute. If 2,500 taxpayers since the enactment of Alabama's Taxpayers' Bill of Rights in 1992 have been able correctly to ascertain that the TBOR and not an original action is the remedy for their refund claims, parties represented by counsel of the stature of petitioners' counsel should have been able to do the same.

Indeed, petitioner Arizona Chemical is one of the 2,500 foreign corporations that have requested franchise tax refunds through proper administrative channels in the wake of *South Central Bell*. Those claims are moving through the administrative process, and many refunds

have already been paid. Petitioners seek reversal of the Alabama Supreme Court's decision in this case, not because it prevents them from obtaining their refunds, but because it prevents them from bringing a *direct class action* to obtain their refunds. This is not an issue worthy of certioriari, let alone a federal issue that comes within the jurisdiction of this Court.

I. The Decision Below Rests on Independent and Adequate State Law Grounds and Is Therefore Barred From Review by This Court.

Section 14 of the Alabama Constitution of 1901 provides:

> That the State of Alabama shall never be a defendant in any court of law or equity.

From 1943 to 1992, Alabama courts did not allow taxpayers to obtain a tax refund from the State unless they followed the administrative procedures prescribed by statute and paid their taxes under protest. Pet. App. 15a-22a. The Alabama Supreme Court has long held that these procedures provided the only method for taxpayers to seek refunds without violating Alabama's sovereign immunity. Pet. App. 17a-22a (*citing Glass v. Prudential Ins. Co.*, 22 So. 2d 13 (1945)).

In 1992, four years before Gladwin commenced this action, the Alabama Legislature enacted the Taxpayer's Bill of Rights and Uniform Procedures Act ("the TBOR"), Ala. Code §§ 40-2A-1 to -15, 40-2A-7(c)(5)c. & -9(g)(1). The TBOR repealed the payment-under-protest provisions that had been in place since 1943. The purpose of the TBOR was to "provide equitable and uniform procedures for the

operation of the [Alabama Department of Revenue] and for all taxpayers when dealing with the department." Ala. Code § 40-2A-2 (*quoted in* Pet. App. 13a n.2).

The TBOR allows a taxpayer up to three years to file a petition for refund of taxes paid to the State. Ala. Code § 40-2A-7(c)(2). If its petition is denied, the taxpayer then has two more years to appeal the denial either to the Administrative Law Division of the Alabama Department of Revenue or to an Alabama circuit court. Ala. Code § 40-2A-7(c)(5)a. & b. If the taxpayer chooses to appeal to the Administrative Law Division and is dissatisfied with the result, it may then appeal within 30 days to an Alabama circuit court. Ala. Code § 40-2A-9(g)(1). If the case reaches the circuit court other than by timely appeal, then the refund claim must be dismissed for lack of jurisdiction. Ala. Code § 40-2A-7(c)(5)c. & -9(g)(1).

The Alabama Supreme Court based its ruling in this case on petitioner's failure to comply with the TBOR and on the unbroken line of authority in the Alabama Supreme Court holding that a taxpayer must comply with the administrative procedures prescribed by statute before it may obtain a refund from the State. Failure to comply with state procedure is an independent and adequate ground of decision barring review by this Court, so long as the State has a legitimate interest in enforcing its procedural rule. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) (*citing Henry v. Mississippi*, 379 U.S. 443, 447 (1965); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334, 342 n.7 (1959); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)). This Court is particularly deferential to the decision by a state court of last resort that the state court does not have subject matter jurisdiction over the case under state law. *Palmer v. Ohio*, 248

U.S. 32, 33 (1918); *Callan v. Bransford*, 139 U.S. 197, 198 (1891); *Smith v. Adsit*, 83 U.S. (16 Wall.) 185, 188 (1873); *Semple v. Hagar*, 71 U.S. (4 Wall.) 431, 434-35 (1867); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 530 (1858); *President & Dirs. of the Bank of Washington v. Arkansas*, 61 U.S. (20 How.) 530, 532 (1858); R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 115 (7th ed. 1993).

Alabama has a legitimate interest in requiring taxpayers to comply with the procedural requirements of its tax refund statutes. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), this Court recognized a State's concern that its "obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the State's ability to engage in sound fiscal planning." *Id.* at 44. The Court further elaborated:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; . . . [or] enforce relatively short statutes of limitations applicable to such actions. . . .

Id. at 45 (citing *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 25 (1920)).

This is not a case in which the state court referred to but did not rely upon a procedural bar as an independent ground for its decision. *Compare, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). In *Caldwell*, this Court found that the state court had not relied upon a procedural bar in reaching its decision. Nevertheless, this Court

acknowledged: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 327 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). Here, the Alabama Supreme Court did not base its decision alternatively on state grounds; it based it exclusively on state grounds.

Neither is this a case in which the state court based its decision on a procedural rule that was not firmly established and strictly and regularly followed. *Compare James v. Kentucky*, 466 U.S. 341, 343 (1984); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). Nor is this a case in which the state court invoked a novel rule, the existence of which Petitioners could not have been "deemed to have been apprised." *Compare NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930).

Instead, the Alabama Supreme Court followed the plain language of the TBOR, an Alabama statute enacted four years before this action was filed, and 63 years of its own precedent holding that taxpayers must follow administrative procedures prescribed by statute before obtaining tax refunds from the State. Nothing "suggests to the reasonable taxpayer that anything less than *strict statutory compliance* is sufficient," and the reasonable taxpayer "had no reason to believe that a direct action against the State was permitted," because "[t]he TBOR is *jurisdictional on its face*." Pet. App. 28a, 33a (citing Ala. Code §§ 40-2A-7(c)(5)c. & -9(g)(1)) (emphasis in original).

Even when a state's highest court overrules its own precedent in construing a statute, which the Alabama Supreme Court did not do here, there is no due process

violation unless a party is deprived of an opportunity to have its federal challenge to a state law heard. For instance, in *Brinkerhoff-Faris*, this Court stated, "Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule [precedent]. Neither of these matters raises a federal question; neither is subject to review." 281 U.S. at 681. In this case, petitioners have not been deprived of an opportunity to make a constitutional challenge to a tax. That challenge has been made already, and sustained, in *South Central Bell*. Petitioners have had ample opportunity to request refunds under *South Central Bell* through the processes set forth in the TBOR. Indeed, petitioner Arizona Chemical has made such a request.

The only precedents that the Alabama Supreme Court overruled in this case were two aberrant decisions by the Alabama Court of Civil Appeals, an intermediate appellate court. Pet. App. 32a-33a. The overruling was no surprise, given previous decisions of the Alabama Supreme Court requiring compliance with the procedures in the tax refund statutes before getting a refund. Even if Alabama's highest court had never considered whether a direct action for tax refunds was permissible under Alabama law, petitioners could not claim injury based on their reliance on decisions of an intermediate court.

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy [is] still available to the plaintiff, there would be no denial of due process in that regard.

Brinkerhoff-Faris, 281 U.S. at 681 n.9.

Fundamental to our system of federalism is the proposition that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (*citing New York v. Ferber*, 458 U.S. 747, 767 (1982); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 226 n.9 (1980); *Wardius v. Oregon*, 412 U.S. 470, 477 (1973); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967)). In the case at hand, the highest court of Alabama interpreted an Alabama statute to prohibit an Alabama court from taking subject matter jurisdiction over petitioners' franchise tax refund claims. Indeed, the court held that the statute was "jurisdictional on its face." Pet. App. 33a (citing Ala. Code § 40-2A-7(c)(5)c. & -9(g)(1)). "When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [this Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Johnson*, 520 U.S. at 919 (*citing Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950); *Georgia Rail Road & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (per curiam); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929)). Because the decision below was based on independent and adequate state law grounds, this Court should decline to review it.

II. Petitioners' "Bait and Switch" Argument Is a Specious Attempt to Create a Federal Issue Where None Exists and Does Not Merit Review By This Court.

Petitioners attempt to manufacture a federal issue by arguing that a reasonable taxpayer had no way of knowing that Alabama's highest court would require it to comply with the TBOR to obtain a refund from the State. Relying on *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442 (1998), petitioners claim that they have been the victims of a judicial "bait and switch" and thus have been denied due process. Pet. 7. This claim is disingenuous at best. The language of the TBOR is clear, and the precedents of the Alabama Supreme Court requiring compliance with administrative procedures before obtaining a tax refund are consistent and long-established. No "reasonable taxpayer" under *Reich* and *Newsweek* would have read the aberrant decisions of the Court of Civil Appeals to obviate compliance with the administrative procedures set forth in the TBOR.

In arguing that they typify the "reasonable taxpayer" under *Reich* and *Newsweek*, petitioners omit several salient facts. First, approximately 2,500 foreign corporations have read the law correctly and have requested franchise tax refunds from the Alabama Department of Revenue through the administrative processes prescribed in the TBOR. Many of these corporations, including the plaintiffs in *South Central Bell*, have already received their refunds. Second, petitioner Arizona Chemical itself has filed a request for a refund under the TBOR. Third, petitioners' counsel advised their foreign corporation clients that they should comply with the TBOR when

seeking a franchise tax refund. Fourth, Gladwin is the only foreign corporation that has requested a franchise tax refund by filing a direct action (a class action) in an Alabama court and not by filing an administrative claim with the Department of Revenue. Pet. App. 33a, 51a, 63a.

In short, petitioners are not the victims they portray themselves to be. They have played the system as long as it has let them, and they have lost. This Court should not allow them to play it any longer.

A. Alabama law made clear that petitioners had to comply with the administrative process prescribed by statute to obtain tax refunds from the State.

As petitioners admit, "the relevant inquiry [under *Reich* and *Newsweek*] is what the 'reasonable' or 'average' taxpayer would have believed was required to obtain a refund." Pet. 6. Petitioners' feigned ignorance of Alabama law is anything but reasonable. "[N]othing in the refund statutes discussed above, or in [the Alabama Supreme] Court's caselaw construing those statutes, suggests to the reasonable taxpayer that anything less than strict statutory compliance is sufficient to support a right to a tax refund from the State. Pet. App. 28a. "The reasonable taxpayer contemplating a forum for franchise-tax refunds had no reason to believe that a direct action against the State was permitted under Alabama law. The TBOR is jurisdictional on its face." Pet. App. 33a (citing Ala. Code §§ 40-2A-7(c)(5)c. & -9(g)(1)).

Much of petitioners' "bait and switch" argument is based on Alabama case law allowing suits for refunds of ad

valorem taxes against counties, which do not enjoy sovereign immunity from suit. The TBOR itself distinguishes ad valorem taxes: "[N]othing herein shall be construed to apply to the assessment of ad valorem taxes on real or personal property which is administered by the various counties of the State of Alabama. . . . " Ala. Code § 40-2A-2(2). Petitioners nevertheless argue that the Commissioner of Revenue was a defendant in three of the ad valorem cases they cite. Pet. 8 (citing *Eagerton v. Williams*, 433 So. 2d 436 (Ala. 1983); *White v. Sims*, 470 So. 2d 1191 (Ala. 1985); *Mingledorff v. Vaughn Regional Medical Center, Inc.*, 682 So. 2d 415 (Ala. 1996)). Petitioners neglect to disclose that, while the taxpayers in these cases were challenging regulations issued by the Commissioner, they were requesting refunds of taxes paid to various counties. In none of these cases was a taxpayer making a refund claim against the Commissioner herself.

Petitioners also rely on three obviously mistaken decisions by the Alabama Court of Civil Appeals, in which the court permitted a taxpayer to sue the State without first complying with statutory procedures. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470 (Ala. Civ. App. 1999); *Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 671 So. 2d 674, 677 (Ala. Civ. App. 1995), *and cert. denied* (Ala. Nov. 9, 1995), *and cert. denied sub nom. Eagerton v. Owner-Operator Indep. Drivers Ass'n, Inc.*, 517 U.S. 1121 (1996); *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993). One of these cases was decided before the TBOR and is therefore superseded.

Another was decided after petitioners filed this lawsuit. All are contrary to the vast weight of authority in the Court of Civil Appeals.[2] More importantly, they are contrary to the unanimous authority of the Alabama Constitution and the Alabama Supreme Court. Ala. Const. § 14; *Glass v. Prudential Ins. Co. of America*, 22 So. 2d 13, 15-18 (1945), *superseded by statute on other grounds as recognized by Mooney v. Weaver*, 79 So. 2d 3 (1955); *J.R. Raible Co. v. State Tax Comm'n*, 194 So. 560, 561 (Ala. 1939). No reasonable taxpayer would have relied on these decisions by an intermediate court of appeals in the face of such conflicting and superior authority. *Brinkerhoff*, 281 U.S. at 681 n.9.

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[2] *State v. Garner*, 812 So. 2d 380, 383-84 (Ala. Civ. App. 2001) (holding that taxpayer's failure to comply strictly with TBOR prevented court from taking jurisdiction over claims); *State v. Adams*, 798 So. 2d 682, 684 (Ala. Civ. App. 2001) (same); *State v. Medical Care Equip., Inc.*, 737 So. 2d 471, 473 (Ala. Civ. App. 1999) (same);. *State v. Zegarelli*, 676 So. 2d 354, 355 (1996) (same); *State v. Wilcox*, 639 So. 2d 1374, 1374 (Ala. Civ. App. 1994) (same); *Cf. Tindle v. State Farm General Ins. Co.*, 2001 WL 564284, at *4 (Ala. Civ. App. May 25, 2001) (recognizing that TBOR requires administrative review in Department of Revenue before proceeding to circuit court); *State v. Sonat, Inc.*, 690 So. 2d 412, 413 (Ala. Civ. App. 1997) (stating that taxpayer had "paid the disputed franchise tax and timely filed its notice of appeal and complaint, thereby complying with the provisions of [TBOR]"); *State v. Taft Coal Sales & Assocs., Inc.*, 801 So. 2d 838, 839 (Ala. Civ. App. 2001) (noting that taxpayer had complied with TBOR by appealing denial of its petition for refund to Administrative Law Division of Department Revenue, then appealing Law Division's adverse decision to Alabama circuit court); *State v. Union Oil Co.*, 686 So. 2d 284, 285 (Ala. Civ. App. 1996) (same); *State v. Kennington*, 679 So. 2d 1059, 1059-60 (Ala. Civ. App. 1995) (same).

B. Petitioners' refund claims do not meet the "ministerial act" exception to the State's sovereign immunity from suit.

Petitioners attempt to distinguish the authority above by arguing that their case fits the exception from sovereign immunity for actions that seek to "compel the performance of ministerial acts." Pet. 9. They contend that "calculating a refund of illegally collected taxes is a ministerial act." Pet. 9. Petitioners act as if the decision below was inconsistent and confusing to them by claiming that the Alabama Supreme Court has ruled on the one hand that calculating tax refunds is ministerial if the taxpayer follows the TBOR and on the other hand that it is not ministerial if the taxpayer files a direct action for a refund. Pet. 10.

First of all, whether petitioners' case meets the "ministerial act" exception to Alabama's sovereign immunity from suit is a pure question of state law barred from review by this Court. Even if it were not, petitioners have misrepresented the holding of the Alabama Supreme Court. What the court held was that "refunding taxes paid through a mistake or error is – in some contexts – a ministerial act, but it is so only because the statutes make it so." Pet. App. 29a. When the taxpayer follows the administrative process prescribed by the refund statute – such that a court can take jurisdiction over and consider a taxpayer's refund claim, and the court can then determine whether the taxpayer is owed a refund and, if so, how much – the payment of the refund is a ministerial act. "It is ministerial because of the specificity with which the Legislature defined the duties of the taxing officials." *Id.*

Under the TBOR, the duty of the Commissioner of the Department of Revenue is to pay a refund only after the

Administrative Law Division of the Alabama Department of Revenue, the Department itself, or a reviewing court has determined that the taxpayer is entitled to a refund. Ala. Code § 40-2A-7(c)(4) ("If a petition is granted, or the department, the Administrative Law Division, or a court otherwise determines that a refund is due, the overpayment shall be refunded to the taxpayer by the state. . . . "). *See*, e.g., *Sparks v. Louisville & Nashville R.R. Co.*, 166 So. 2d 865, 866 (Ala. 1964) (applying "ministerial act" exception when taxpayer had first "filed with the Alabama State Department of Revenue, pursuant to [former Ala. Code § 40-1-34], a petition for refund"). Because petitioners chose to file a direct action against the State, they have not established their right to a refund such that payment of the refund would be a "ministerial act."

C. The Alabama courts have never recognized an exception to the State's sovereign immunity when a taxpayer claims that a tax is "void or illegal" and seeks a refund.

Petitioners next claim that the Alabama Supreme Court overruled more than "45 years of Alabama precedent on which Petitioners relied to bring this suit." Pet. 6. Petitioners claim that the Alabama Supreme Court has previously allowed taxpayers to bring direct actions for refunds when the tax is challenged as "void or illegal." Pet. 7 (citing *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956)). By implication, at least, petitioners presume that this Court's decision in *South Central Bell* rendered Alabama's former franchise tax on foreign corporations "void or illegal." The Alabama Supreme Court has never recognized the exception to sovereign immunity that

petitioners hypothesize, and *South Central Bell* did not render Alabama's franchise tax "void or illegal" in any event.

1. As long ago as *Glass v. Prudential Ins. Co.*, 22 So. 2d 13 (Ala. 1945), the Alabama Supreme Court held that a taxpayer challenging the legality of a tax still had to comply with the administrative processes prescribed by the applicable tax refund statute in order to make that challenge. In *Glass*, a foreign insurance company, Prudential, filed a declaratory judgment action against the Alabama Superintendent of Insurance, challenging the constitutionality of Alabama's business license tax on the basis that it discriminated in favor of domestic insurance companies. 22 So. 2d at 14. Prudential filed its action on February 26, 1945, and at the same time sought an injunction to prevent the revocation of its business license for its failure to pay the tax, which was to become delinquent in just a few days (60 days after December 31, 1944). *Id.* at 14-15. The Alabama Supreme Court noted that Prudential could have brought the declaratory judgment action against the Superintendent if it had not waited until the eve of delinquency to file it. *Id.* at 15; *accord Curry v. Woodstock Slag Corp.*, 6 So. 2d 479 (Ala. 1942) (permitting action against Commissioner of Revenue seeking only a declaratory judgment that plaintiff did not have to pay sales tax). Because Prudential had waited so long, however, the court ruled that Prudential first had to pay the tax to prevent revocation of its license, so long as Prudential had a legal remedy through which it could later obtain a refund if it prevailed on the merits of its constitutional challenge. 22 So. 2d at 15 (citing *State v. Inman*, 191 So. 224 (1939)). The court ruled that Prudential had such a remedy, in the form of the payment-under-protest statute

discussed above that permitted a taxpayer to appeal to a court if a state official wrongly denied its refund request. 22 So. 2d at 15-16.

In short, the Alabama Supreme Court acknowledged that a taxpayer could request that a court consider its request for a refund, but only after the taxpayer had complied with the procedure prescribed by the applicable tax refund statute. The court did not rule that the taxpayer could bring a direct action against the State to obtain a refund. The court required the taxpayer to comply with the administrative procedure even when the taxpayer contended that the tax was unconstitutional and thus "void or illegal."

2. Petitioners incorrectly presume, moreover, that the taxes at issue here are "void or illegal." In *South Central Bell*, this Court concluded that the Alabama franchise tax regime as a whole, not the foreign franchise tax standing alone, was unconstitutionally discriminatory. 526 U.S. at 169. As this Court noted in *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18 (1990), there is an important difference between taxes that are discriminatory and those that are "void or illegal." In addressing the effect of the decision of the Florida courts that had held the tax at issue to be unconstitutionally discriminatory, this Court explained:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in *O'Connor*, or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in *Ward* and *Carpenter*, no corrective action by the State could cure the invalidity of the

> tax during the contested tax period. The State would have had no choice but to 'undo' the unlawful deprivations by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."
>
> Here, however, the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce.

McKesson, 496 U.S. at 39 (citations omitted).

In a bizarre twist, petitioners claim that the decision below, in recognizing that taxpayers may get refunds from the State through the TBOR, itself violates sovereign immunity. Pet. 10-11. What taxpayers would gain from this Court's agreement with petitioners' argument is anything but clear, but it is incorrect in any event. The Alabama Legislature is free to enact laws establishing the jurisdiction of Alabama's courts. The TBOR simply codified years of Alabama sovereign immunity jurisprudence that made compliance with procedural tax statutes jurisdictional. The Alabama Supreme Court has held, moreover, that a taxpayer's appeal from the Department of Revenue to an Alabama court does not constitute an action in which the State is made a "defendant in any court," as prohibited by § 14 of the Alabama Constitution. *State v. Louis Pizitz Dry Goods Co.*, 11 So. 2d 342, 346 (Ala. 1943); *accord Metcalf v. Department of Indus. Relations*, 16 So. 2d 787, 790 (Ala. 1944) ("These proceedings are in effect only an appeal from the order of the Department of Industrial

Relations. . . . This is not forbidden by § 14 of the Constitution").

Petitioners did not challenge the constitutionality of the TBOR below. It is worthy of note, however, that petitioners now insist that the State's immunity is absolute and that the law of Alabama regarding sovereign immunity has been clear for 126 years. Pet. 10-11. With this, the Commissioner cannot argue.

D. The Alabama Supreme Court did not previously hold in this case that petitioners had a remedy in the form of a direct class action for tax refunds.

Petitioners assert, finally, that the Alabama Supreme Court stated in a previous decision in this litigation that Gladwin's direct class action was an available method to obtain a tax refund. Pet. 5, 11-12. In a sophistical attempt to transform their own argument into the holding of the Alabama Supreme Court, petitioners state:

> The Alabama Supreme Court's holding that Petitioners cannot sue directly for a refund is all the more surprising, considering that the same court, three-and-a-half years earlier in this case, held that Petitioners were not entitled to equitable relief from the State because they had an adequate remedy at law, namely, "the full range of retroactive relief, including refunds" required by this Court's decisions in *Newsweek*, *Reich*, and *McKesson*.

Pet. 11-12 (citing Pet. App. 72a).

The issue in the earlier case before the Alabama Supreme Court was whether Gladwin was entitled to a

preliminary injunction requiring their franchise tax payments to be held in escrow pending the decision whether Alabama's franchise tax was constitutional. The first showing that Gladwin had to make to obtain the preliminary injunction was that "without the injunction the plaintiff would suffer immediate and irreparable injury." Pet. App. 70a. The court found that "Gladwin's forceful arguments" of its entitlement to refunds prevented it from meeting the first necessary element. Pet. App. 72a. The court explained Gladwin's arguments and its holding as follows:

> In the section of its brief to this Court headed "Point III," Gladwin argues that if the statute is determined to be unconstitutional, the state may be required to provide "'meaningful backward-looking relief to rectify any unconstitutional deprivation,'" namely, "refunds." (Brief of Appellee [Gladwin] at pp. 19-20) (*quoting McKesson*, [496 U.S. at 39].) . . . As further support for this proposition, Gladwin cites other decisions from the United States Supreme Court, including *Newsweek, Inc. v. Florida Department of Revenue*, [522 U.S. 442] (1998); *Reich v. Collins*, 513 U.S. 106 (1994); and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993).
>
> Gladwin's forceful arguments betray its contention that without the injunction it "face[s] an imminent risk of irreparable injury" if § 40-14-1 is ultimately held to be unconstitutional. In other words, Gladwin strenuously argues that it is entitled to the full range of retroactive relief, including refunds, if it prevails on the merits. Because it has thus failed to meet its burden of demonstrating to this Court that the elements necessary to support the injunction are satisfied,

> the order of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Pet. App. 71a-72a. The court did not hold, as petitioners now suggest, Pet. 11-12, that petitioners had the full arsenal of legal remedies available to them, including a direct class action against the State. Rather, the court stated that Gladwin had made a convincing argument that it would have available some sort of retroactive relief and thus had failed to meet its burden of showing irreparable injury. The court said nothing about whether a direct class action, as opposed to an administrative claim, was the appropriate means for petitioners to obtain the refunds they might later seek.

E. The 2,500 foreign corporations that have sought refunds through the administrative process prescribed by Alabama statute are the true measure of the "reasonable taxpayer."

In touting themselves as the "reasonable" or "average" taxpayers, petitioners fail to acknowledge several facts. First, approximately 2,500 foreign corporations have requested franchise tax refunds through the TBOR. These claims have either been settled or are currently pending in Alabama courts or in the Department of Revenue. Pet. App. 2a, 33a, 63a.

Second, one of the 2,500 taxpayers that recognized the necessity of complying with the TBOR was petitioner Arizona Chemical. Before joining Gladwin in this class action, Arizona Chemical filed an individual refund claim with the Administrative Law Division of the Department

of Revenue. The Alabama Supreme Court thus noted: "For all that appears, [Arizona Chemical] may still prosecute its individual claim for refunds in the proceeding it commenced under the TBOR before it joined this action." Pet. App. 33a.

Third, petitioners' counsel recognized the risk that the State's highest court would require compliance with the TBOR in franchise tax refund cases. They advised their foreign corporation clients seeking franchise tax refunds that "it would be prudent to file administrative petitions for refunds. . . . " Pet. App. 51a. Those taxpayers that took counsel's advice and complied with the TBOR will have their refund claims heard.

Fourth, Gladwin was the only taxpayer out of 2,500 foreign corporations that requested franchise tax refunds in Alabama solely by filing a direct action against the State (a class action), instead of pursuing its claims first through the TBOR. Gladwin had numerous judicial warnings and opportunities to make its refund claims under the TBOR but failed to do so. The TBOR does not provide a procedure for a class action, and Gladwin risked its relatively small individual claim for the chance that it would recover $1 billion for all taxpayers' claims in a direct class action.

In sum, Gladwin "assume[d] the risk that the ultimate interpretation by the highest court might differ from its own." *Brinkerhoff*, 281 U.S. at 681 n.9. Gladwin made its bed. Now it must lie in it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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